

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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KENNETH HOBODY, Successor Personal  
Representative of the Estate of DONNY  
HARRISON, Deceased, and APRIL HARRISON,  
Personal Representative of the Estate of DONNY  
HARRISON, Deceased,

Plaintiffs-Appellees,

v

HARPER UNIVERSITY HOSPITAL, DETROIT  
MEDICAL CENTER, and PAUL S.  
SWERDLOW, M.D.,

Defendants-Appellants.

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UNPUBLISHED  
October 18, 2007

No. 258114  
Wayne Circuit Court  
LC No. 03-331642-NH

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KENNETH HOBODY, Successor Personal  
Representative of the Estate of DONNY  
HARRISON, Deceased, and APRIL HARRISON,  
Personal Representative of the Estate of DONNY  
HARRISON, Deceased,

Plaintiffs-Appellees,

v

HARPER UNIVERSITY HOSPITAL, DETROIT  
MEDICAL CENTER, and PAUL S.  
SWERDLOW, M.D.,

Defendants-Appellants.

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No. 260666  
Wayne Circuit Court  
LC No. 03-331642-NH

KENNETH HOBODY, Personal Representative of  
the Estate of DONNY HARRISON, Deceased,

Plaintiff-Appellee,

HARPER UNIVERSITY HOSPITAL, DETROIT  
MEDICAL CENTER, and PAUL S.  
SWERDLOW, M.D.,

No. 270471  
Wayne Circuit Court  
LC No. 06-601087-NH

Defendants-Appellants.

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Before: Wilder, P.J., and Borrello and Beckering, JJ.

PER CURIAM.

These consolidated appeals involve wrongful death medical malpractice actions. In Docket No. 258114, defendants appeal by leave granted from a circuit court order denying their motion for summary disposition under MCR 2.116(C)(7) (statute of limitations), with respect to a complaint filed by April Harrison, the original personal representative of the decedent's estate in LC No. 03-331642-NH. In Docket No. 260666, defendants appeal by leave granted from two circuit court orders in LC No. 03-331642-NH, which denied their motions for summary disposition under MCR 2.116(C)(8) with respect to their attacks on the sufficiency of Harrison's notice of intent to sue defendants and affidavit of merit that she filed with her complaint. In Docket No. 270471, defendants appeal by leave granted from a circuit court order entered in LC No. 06-601087-NH, denying their motion for summary disposition pursuant to MCR 2.116(C)(6), which challenged the validity of a medical malpractice complaint that the estate's successor personal representative, Kenneth Hobdy, filed in a separate action. Predicated on recent decisions by this Court and our Supreme Court, we are compelled to reverse and remand the matter to the trial court for entry of summary disposition in favor of defendants.

In Docket No. 258114, defendants challenged the timeliness of the initial complaint filed by Harrison. This Court reviews de novo a circuit court's summary disposition ruling. *Beaudrie v Henderson*, 465 Mich 124, 129; 631 NW2d 308 (2001).

Under MCR 2.116(C)(7), summary disposition is proper when a claim is barred by the statute of limitations. In determining whether summary disposition was properly granted under MCR 2.116(C)(7), this Court "consider(s) all documentary evidence submitted by the parties, accepting as true the contents of the complaint unless affidavits or other appropriate documents specifically contradict them." [*Waltz v Wyse*, 469 Mich 642, 647-648; 677 NW2d 813 (2004), quoting *Fane v Detroit Library Comm*, 465 Mich 68, 74; 631 NW2d 678 (2001).]

"Whether a period of limitations applies to preclude a party's pursuit of an action constitutes a question of law that we [also] review de novo." *Detroit v 19675 Hasse*, 258 Mich App 438, 444; 671 NW2d 150 (2003). "Additionally, the application of a legal doctrine, such as res judicata, presents a question of law that we review de novo." *Washington v Sinai Hosp of Greater Detroit*, 478 Mich 412, 417; 733 NW2d 755 (2007).

The limitation period governing a wrongful death action depends on the period of limitation applicable to the underlying theory of liability. *Lipman v William Beaumont Hosp*,

256 Mich App 483, 490; 664 NW2d 245 (2003). A medical malpractice plaintiff has two years from the date the cause of action accrued in which to file suit. MCL 600.5805(6).<sup>1</sup> A medical malpractice claim generally “accrues at the time of the act or omission that is the basis for the claim of medical malpractice.” MCL 600.5838a(1).<sup>2</sup> The alleged negligence of defendants occurred during the decedent’s visit to Harper Hospital between January 5, 2001 and January 11, 2001, but for analysis purposes we will consider the date of the decedent’s discharge as the accrual date for the malpractice claims. Thus, the period of limitation in § 5805(6) extended through January 11, 2003, at the latest. Harrison’s filing of the complaint on September 22, 2003, occurred well beyond the period in § 5805(6).

In wrongful death actions, however, the Legislature has afforded plaintiff personal representatives additional time in which to pursue legal action on behalf of a decedent’s estate. The wrongful death saving period, MCL 600.5852, provides as follows:

If a person dies before the period of limitations has run or within 30 days after the period of limitations has run, *an action which survives by law may be commenced by the personal representative of the deceased person at any time within 2 years after letters of authority are issued* although the period of limitations has run. But an action shall not be brought under this provision unless the personal representative commences it within 3 years after the period of limitations has run. [Emphasis added.]<sup>3</sup>

Because Harrison received letters of authority on April 2, 2001, the wrongful death saving period extended the time in which she could bring suit through April 2, 2003. Harrison gave defendants the mandatory notice of her intent to sue<sup>4</sup> on March 27, 2003, shortly before the wrongful death saving period expired.

The estate maintains that at the time Harrison filed her complaint, the notice of her intent to sue tolled the wrongful death saving period. According to MCL 600.5856(c), “[t]he *statutes of limitations or repose* are tolled . . . [a]t the time notice is given in compliance with the applicable notice period under section 2912b, if during that period a claim would be barred by

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<sup>1</sup> When the decedent’s cause of action accrued, subsection (6) was codified as subsection (4). The analysis in this opinion references the current subsection.

<sup>2</sup> Although MCL 600.5838a(2) gives a medical malpractice plaintiff until “6 months after the plaintiff discovers or should have discovered the existence of the claim” to file suit, the discovery rule is not at issue in this case.

<sup>3</sup> “[T]he three-year ceiling in the wrongful death saving provision is not an independent period in which to file suit; it is only a limitation on the two-year saving provision itself. Therefore, the fact that the three-year ceiling was not yet reached when [the plaintiff] filed suit is irrelevant.” *Farley v Advanced Cardiovascular Health Specialists, PC*, 266 Mich App 566, 575; 703 NW2d 115 (2005).

<sup>4</sup> MCL 600.2912b(1).

the statute of limitations or repose . . . .” (Emphasis added).<sup>5</sup> In *Waltz, supra* at 648-651, 655, the Michigan Supreme Court held that under the clear and unambiguous language of MCL 600.5856, the giving of a notice of intent to sue during the two-year malpractice period of limitation in MCL 600.5805(6) operates to toll this period, but that the giving of notice does not toll the period in MCL 600.5852, which constitutes a wrongful death *saving period*, “an *exception* to the limitation period.” (Emphasis in original). Controlling decisions of this Court since have determined that (1) the Supreme Court’s holding in *Waltz* “applies retroactively in all cases,” *Mullins v St Joseph Mercy Hosp*, 271 Mich App 503, 509; 722 NW2d 666 (2006), lv gtd 477 Mich 1066 (2007), and (2) equitable or “judicial tolling should not operate to relieve wrongful death plaintiffs from complying with *Waltz*’s time restraints,” *Ward v Siano*, 272 Mich App 715, 720; 730 NW2d 1 (2006), lv in abeyance \_\_\_ Mich \_\_\_; 729 NW2d 213 (2007).

In summary, Harrison’s provision of notice within the wrongful death saving period did not toll the saving period pursuant to MCL 600.5856(c). *Waltz, supra* at 648-651, 655. Accordingly, Harrison’s filing of her complaint on September 22, 2003, occurred almost six months after the wrongful death saving period had expired.<sup>6</sup>

The estate also contends that Hobdy’s appointment as its successor personal representative on June 18, 2004, either rendered timely the action commenced by Harrison, or entitled him to a new wrongful death saving period in which to pursue a separate legal action, which he timely did by filing the complaint in LC No. 06-601087-NH on January 11, 2006. The Michigan Supreme Court in *Eggleston v Bio-Medical Applications of Detroit, Inc*, 468 Mich 29, 33; 658 NW2d 139 (2003), determined that MCL 600.5852 “clearly allows an action to be brought within two years after letters of authority are issued to the personal representative.” Because § 5852 “does not provide that the two-year period is measured from the date letters of authority are issued to the initial personal representative,” the Supreme Court held that the successor personal representative could timely file suit within two years after receiving his letters of authority, and “‘within 3 years after the period of limitations ha(d) run.’” *Id.*, quoting § 5852.

This Court has distinguished *Eggleston* and declined to apply it, however, in cases involving the original personal representative’s untimely filing of a complaint. In *Glisson v Gerrity*, 274 Mich App 525, 538-539; 734 NW2d 614 (2007), this Court rejected the successor personal representative’s claim that, despite the original personal representative’s filing of an untimely complaint, a “dismissal without prejudice is nevertheless appropriate because” *Eggleston*’s interpretation of MCL 600.5852 afforded him “an additional two years, measured from . . . the date of his appointment . . . to pursue a cause of action on behalf of the estate.” In

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<sup>5</sup> At the time Harrison gave notice in March 2003, subsection (c) was codified as subsection (d). Although the language in subsection (d) was organized differently than the current subsection, the reorganization of the wording does not appear to have altered the subsection’s meaning in any respect. For consistency, the analysis refers to current subsection (c).

<sup>6</sup> As summarized in *Farley, supra* at 576 n 27, both the Michigan Supreme Court and this Court have rejected the notion that a retroactive application of *Waltz*, in a manner that renders an estate’s commencement of suit as untimely, qualifies as an unconstitutional abbreviation of the period for filing suit.

procedural circumstances that parallel those in this case, the Court further explained as follows that the successor representative's mere appointment did not save the untimely filed complaint:

*By filing the amended complaint naming him as the successor personal representative, Barry Glisson was essentially trying to revive a previously filed untimely action. However, a successor personal representative cannot rely on or revive an untimely complaint that was filed before his or her appointment because there would be no benefit to ratifying the untimely action. The mere appointment of a successor personal representative does not transform the previously filed untimely action into a timely one. Therefore, in the present case, Barry Glisson is bound by Michael Glisson's untimely filed action, and dismissal with prejudice remains the appropriate remedy. [Glisson, supra at 538-539 (emphasis added).]*

See also *McLean v McElhaney*, 269 Mich App 196, 201-202; 711 NW2d 775 (2005), lv in abeyance \_\_\_ Mich \_\_\_; 728 NW2d 867 (2007) (finding the plaintiff copersonal representatives' medical malpractice complaint untimely, and rejecting their *Eggleston*-based assertion "that the trial court should have permitted a voluntary dismissal of [the] plaintiffs' claims without prejudice so that a new personal representative could have been appointed to file suit on behalf of [the] estate"); *McMiddleton v Bolling*, 267 Mich App 667, 671-674; 705 NW2d 720 (2005) (rejecting the contention that "the subsequent appointment of the successor personal representative revived the complaint that the original personal representative filed untimely, i.e., more than two years after the original personal representative was appointed").<sup>7</sup>

Moreover, the Michigan Supreme Court's recent decision in *Washington*, supra at 412, undermines the estate's argument that notwithstanding the original personal representative's filing of an untimely complaint, a duly appointed successor personal representative still may timely initiate a separate action within two years of his appointment and within three years of the expiration of the medical malpractice period of limitation. In *Washington*, the original personal representative filed an untimely complaint that the circuit court dismissed pursuant to MCR 2.116(C)(7), and the plaintiff, a later-appointed successor personal representative, also filed a complaint on the estate's behalf. *Id.* at 415. The Michigan Supreme Court held that res judicata barred the successor's action. *Id.* at 417-422.

Application of the analysis in *Washington* to this case yields the conclusion that res judicata bars Hobdy from pursuing a second wrongful death medical malpractice action on the estate's behalf. First, the circuit court should have found involuntary dismissal of the complaint filed by Harrison warranted under subrule (C)(7), which ground embodies a dismissal on the merits under MCR 2.504(B)(3). *Washington*, supra at 419. Additionally, Hobdy is in privity with Harrison because both represent the legal interest of the estate. *Id.* at 421-422. Regarding the third res judicata element, whether the matter raised in the second case was or could have been resolved in the first, a comparison of the original complaint filed by Harrison, the amended

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<sup>7</sup> Because Hobdy's appointment cannot revive Harrison's untimely complaint, we need not address whether the circuit court properly granted the estate's motion to amend the initial complaint to reflect Hobdy's appointment.

complaint filed by Hobdy in LC No. 03-331642-NH, and the nearly identical complaint filed by Hobdy in LC No. 06-601087-NH reveals that apart from minor differences in the caption and one paragraph reflecting Hobdy's appointment as the estate's successor personal representative, the allegations of negligence in all three complaints encompass the same defendants, the same time period, and the same maltreatment of the decedent. Hobdy's complaint in LC No. 06-601087-NH thus involves the same operative facts as the basis for relief asserted in the complaints filed by Harrison and Hobdy in LC No. 03-331642-NH. *Id.* at 420.

In conclusion, the circuit court should have dismissed LC No. 03-331642-NH pursuant to MCR 2.116(C)(7) (statute of limitations) because Harrison untimely commenced it, and the circuit court should have also dismissed LC No. 06-601087-NH pursuant to subrule (C)(7) on the basis that res judicata precluded Hobdy from pursuing this new action. Because we conclude that dismissal of both actions is appropriate under MCR 2.116(C)(7), we need not consider defendants' additional issues on appeal.

Reversed and remanded for entry of an order granting defendants summary disposition pursuant to MCR 2.116(C)(7) in both LC No. 03-331642-NH and LC No. 06-601087-NH. We do not retain jurisdiction.

/s/ Kurtis T. Wilder  
/s/ Stephen L. Borrello  
/s/ Jane M. Beckering